IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 14, 2006

RICKY WAYNE McELHANEY v. JACK MORGAN, WARDEN

Direct Appeal from the Criminal Court for Morgan County
No. 9127 E. Eugene Eblen, Judge

No. E2006-00624-CCA-R3-HC - Filed April 26, 2007

The petitioner, Ricky Wayne McElhaney, pled guilty to several offenses, receiving a total effective sentence of twenty-two years. Subsequently, the petitioner filed in the Morgan County Criminal Court a petition for a writ of habeas corpus, alleging that the sentence for the offense of burglary of a business house was illegal. The habeas corpus court dismissed the petition, and the petitioner now appeals. Upon our review of the record and the parties' briefs, we affirm the judgment of the habeas corpus court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Joe H. Walker and Walter B. Johnson, II, Harriman, Tennessee, for the appellant, Ricky Wayne McElhaney.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball and John H. Bledsoe, Assistant Attorneys General; and J. Scott McCluen, District Attorney General; for the appellee, State of Tennessee.

OPINION

I. Factual Background

On June 29, 1993, the petitioner entered guilty pleas to four offenses. The first offense, burglary of a business house, was committed on May 27, 1989. The remaining offenses, theft of property valued over $500 and two counts of felonious failure to appear, were committed in 1992 and 1990, respectively. Pursuant to the plea agreement, the petitioner was sentenced as a Range III persistent offender to twelve years on the burglary charge, four years on the theft charge, and six years for each failure to appear charge. The sentences were run consecutively for a total effective sentence of twenty-two years.

On July 8, 1993, the parties returned to court for a "continuation" or "amendment" of the proceedings. During the hearing, the State announced:

> [At the prior proceeding] we had announced a plea agreement of 12 years, Range III, on burglary of a business house. That's an old law and when I say an old law, I mean a pre-November 1st, 1989 case. Apparently there is some precedent that has been established since that time that says when the old law did not allow for a sentence in excess say, for instance, in this case ten years, and the new law classifies this as a Class D felony, which would subject the defendant to 12 years, then the defendant is to be given the benefit of the lesser sentence.

Accordingly, the State and the petitioner agreed to modify the petitioner's sentence for burglary of a business house to ten years as a Range III offender. In order to keep the total effective sentence of twenty-two years, the State and the petitioner also agreed that the petitioner would be sentenced to six years for the theft offense, instead of the original sentence of four years.

Subsequently, the petitioner filed a petition for a writ of habeas corpus. In his petition, the petitioner alleged that "the maximum sentence [he] could have received under the 1982 Sentencing Act was 10 years at 40%." The petitioner complained that because he "received a sentence of 10 years at 45% the sentence is illegal and void."

After a brief hearing on the petition, the habeas corpus court found:

> I think the petition has to fail. The circumstances as not being in the Court for part of habeas corpus relief on that is not a void judgment, and it was by agreement of the parties and the attorneys at the sentencing. Or the [petitioner] said he understood what he was agreeing to, and what the term was and how it was to be served.

On appeal, the petitioner contests the habeas corpus court's ruling.

II. Analysis

Initially, we note that the determination of whether to grant habeas corpus relief is a question of law. Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007). As such, we will review the trial court's findings de novo without a presumption of correctness. Id. Moreover, it is the petitioner's burden to demonstrate, by a preponderance of the evidence, "that the sentence is void or that the confinement is illegal." Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000).

Article I, § 15 of the Tennessee Constitution guarantees an accused the right to seek habeas

corpus relief. See Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). However, "[s]uch relief is available only when it appears from the face of the judgment or the record of the proceedings that a trial court was without jurisdiction to sentence a defendant or that a defendant's sentence of imprisonment or other restraint has expired." Wyatt, 24 S.W.3d at 322; see also Tenn. Code Ann. § 29-21-101 (2000). In other words, habeas corpus relief may be sought only when the judgment is void, not merely voidable. Taylor, 995 S.W.2d at 83. "A void judgment 'is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired.' We have recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal." Stephenson v. Carlton, 28 S.W.3d 910, 911 (Tenn. 2000) (quoting Taylor, 995 S.W.2d at 83).

The petitioner maintains that "the maximum sentence [he] could have received under the 1982 Sentencing Act was 10 years at 40%." The petitioner complained that because he "received a sentence of 10 years at 45% the sentence is illegal and void." Tennessee Code Annotated section 40-35-117(b) (emphasis added) provides that "[u]nless prohibited by the United States or Tennessee constitution, any person sentenced on or after November 1, 1989, for an offense committed between July 1, 1982 and November 1, 1989, *shall* be sentenced under the provisions of this chapter." The judgment of conviction for the offense of burglary of a business house reflects that the petitioner was being sentenced under the 1989 Sentencing Act. Moreover, the judgment and both sentencing hearings reflect that the petitioner agreed to be sentenced as a Range III persistent offender with its accompanying 45% release eligibility, a classification that did not exist under the 1982 Sentencing Act. "[A] knowing and voluntary guilty plea waives any irregularity as to offender classification or release eligibility." State v. Hicks, 945 S.W.2d 706, 709 (Tenn. 1997). This court has repeatedly stated that offender classifications "are non-jurisdictional and legitimate bargaining tools in plea negotiations under the Criminal Sentencing Reform Act of 1989." Bland v. Dukes, 97 S.W.3d 133, 134 (Tenn. Crim. App. 2002). Accordingly, we agree with the habeas corpus court that the petitioner is not entitled to habeas corpus relief.

III. Conclusion

Finding no error, we affirm the judgment of the habeas corpus court.

NORMA McGEE OGLE, JUDGE